

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FILED
April 12, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
)
)
VS.)
)
FREDDIE MORROW, et al.,)
)
Appellant.)
and)
)
MEREDITH CORPORATION,)
owner and operator of WSMV-)
TV Channel Four LANDMARK)
TELEVISION OF TN, INC.,)
owner and operator of WTVF-)
TV Channel Five, and YOUNG)
BROADCASTING OF)
NASHVILLE, INC. owner and)
operator of WKRN-TV Channel)
Two)

C.C.A. NO. 02C01-9601-CC-00022

ROBERTSON COUNTY

HON. ROBERT W. WEDEMEYER
JUDGE

(T.R.A.P. 10 Extraordinary Appeal)

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OPINION FILED _____

REVERSED AND REMANDED

JERRY L. SMITH, JUDGE

OPINION

In this extraordinary appeal filed pursuant to Tenn. R. App. P. 10, the intervenors/appellants, members of the broadcast media, seek review of the orders of the lower court excluding television cameras from the courtroom during the trial proceedings of three criminal defendants. The intervenors allege that the trial judge abused his discretion under Rule 30 of the Tennessee Supreme Court and that the orders concerning television cameras violate the free press and equal protection guarantees of the United States Constitution found in the First Amendment and Fourteenth Amendment, respectively.¹ They also maintain that the orders in question violate the Tennessee Constitution's law of the land clause found at Article 1, Section 8 as well as the open courts clause of Article 1, Section 17 and the free press guarantees of Article 1, Section 19.

We have reviewed the orders of the trial court and the record of the proceedings concerning media coverage of the criminal trial and have been unable to find any factual basis warranting an exercise of discretion which excludes television cameras from the trial proceedings. We therefore reverse the orders of the trial court with respect to media coverage and remand for further proceedings consistent with this opinion.

This case involves the trial of three young black men charged in the fatal shooting of a young white man who was apparently displaying a Confederate battle flag at the time of the shooting. The defendants claim that they were provoked by the display of this flag. The case has stirred strong emotions in some members of both races in the local community. As a result, the case has been the subject of intense media coverage.

¹Rule 30 of the Tennessee Supreme Court became effective January 1, 1996. It is a one year pilot project which, unless extended, will expire on December 31, 1996. The rule governs media coverage in Tennessee courts and permits, upon proper request, television cameras to be present in the courtroom during judicial proceedings. Rule 30D (2) grants the presiding judge at the proceeding the discretion to refuse, limit, terminate, or suspend media coverage under certain circumstances.

The criminal trial in this matter was set to begin on January 9, 1996. On January 5, 1996, Intervenor Meredith Corporation, owner and operator of WSMV-TV Channel Four in Nashville, requested permission of the trial court to place a television camera in the courtroom during the criminal proceedings. On this same date, the trial judge entered an order regarding media coverage that permits still photographs of the proceedings and audio recordings but excludes television cameras from the courtroom. This order recites that the trial judge “specifically finds that the televising of this trial would interfere with the Court’s ability to maintain decorum, prevent distractions, and most importantly to guarantee the safety of witnesses and jurors.” Apparently, this January 5 order was entered summarily. There was no hearing or presentation of any evidence which would support the trial judge’s finding that, in this case, the presence of television cameras in the courtroom would disrupt the proceedings or present a security problem.

Subsequent to the January 5 order regarding media coverage, the defendants waived their right to a jury trial. On January 8, the intervenors/appellants filed motions to intervene and for reconsideration of the trial court’s order regarding media coverage. The basis for the request for reconsideration centered around the fact that the safety of jurors would no longer be a factor in the admission of cameras to the courtroom.

At a hearing on January 9, 1996, prior to the commencement of the trial on that date, the trial judge granted the motions to intervene. The transcript of that hearing consists largely of argument of intervenors’ counsel and a presentation by the intervenors of their plan for in-court television coverage. The prosecutor expressed concern that live coverage might cause problems; however, he expressed no opposition to the presence of television cameras in the courtroom for the purposes of videotaping the proceedings. Although various counsel for the defendants stated their opposition to the cameras out of fear for the safety of their clients and witnesses, they offered no evidence to substantiate this fear. Absolutely

no evidence was introduced by any participant in the proceedings which would indicate that the presence of television cameras would distract participants, create a disturbance, or compromise the safety of anyone.

Following the hearing, the trial judge concluded that the proposed procedures for televising the trial would in all likelihood be satisfactory for maintaining courtroom decorum and would probably be acceptable in some other case. However, the judge was of the opinion that, in view of the emotionally charged nature of this particular case and the intense pretrial publicity surrounding it, the presence of television cameras in the courtroom might compromise the safety of the witnesses, defendants, family members of the victim, and attorneys. In addition, the trial court expressed concern that witnesses' testimony might be affected by the presence of television cameras. The trial judge therefore declined to modify its January 5 order barring television cameras from the courtroom.

The trial of the defendants went forward, and on January 12, 1996, two of them were convicted of first degree felony murder, attempted aggravated kidnapping, and civil rights intimidation.² The third defendant was acquitted on all counts. On January 11, 1996, one day prior to the conclusion of the trial, the intervenors/appellants filed an application for permission to appeal to this Court pursuant to Tenn. R. App. P. 10. This application is the prescribed mechanism for an appeal of a trial court's decision regarding media coverage. This Court granted the application and offered both the State and counsel for the defendants an opportunity to respond to the arguments of the intervenors/appellants with respect to the presence of television cameras in the courtroom. In response, the State

²Although the matter may at first blush appear to be moot, this Court has concluded that, due to the extremely lenient provision of Rule 30A (2) requiring that a request for media coverage of a judicial proceeding be made only two business days in advance of the proceeding, the issues in the appeal are capable of repetition yet evading review. In addition, this case presents issues of great public interest and importance to the administration of justice. These considerations are the most common exceptions to the mootness rule. See, e.g., Bemis Pentecostal Church v. State, 731 S.W.2d 897, 903 (Tenn. 1987); New Riviera Arts Theatre v. Davis, 412 S.W.2d 890, 893 (Tenn. 1967); McIntyre v. Traughber, 884 S.W.2d 134-37 (Tenn. Ct. App. 1994). We hold, therefore, that the issues presented in this appeal remain justiciable.

essentially took no position with respect to this controversy. Counsel for the defendants declined to file any response.

The Rules of the Tennessee Supreme Court provide as follows:

Coverage Generally. Media coverage of public judicial proceedings in the appellate and trial courts of this State shall be allowed in accordance with the provision of this rule. The coverage shall be subject, at all times, to the authority of the presiding judge to i) control the conduct of the proceedings before the court; ii) maintain decorum and prevent distractions; iii) guarantee the safety of any party, witness, or juror, and iv) ensure the fair and impartial administration of justice in the pending cause.

Tenn. Sup. Ct. R. 30A (1) (emphasis added). Section B of Rule 30 sets forth the relevant definitions of terms used in the rule:

- (1) **“Coverage”** means any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment.
- (2) **“Media”** means legitimate news gathering and reporting agencies and their representatives whose function is to inform the public, or persons engaged in the preparation of educational films or recordings.
- (3) **“Proceeding”** means any trial, hearing, motion, argument or appeal, or other matter held in open court that the public is entitled to attend.

Read together, these provisions create a presumption in favor of in-court media coverage of judicial proceedings. However, Rule 30D (2) gives the presiding judge at a judicial proceeding the discretion to “refuse, limit, terminate or temporarily suspend media coverage” in all or part of a case if necessary to

- (i) control the conduct of the proceedings before the court;
- (ii) maintain decorum and prevent distractions;
- (iii) guarantee the safety of any party, witness, or juror; and
- (iv) ensure the fair administration of justice in the pending cause.

_____ The intervenors/appellants take the position that the cases of State v. Drake, 701 S.W.2d 604 (Tenn. 1985), and State v. James, 902 S.W.2d 911 (Tenn. 1995), are applicable to the case at hand. In these cases, the Tennessee Supreme Court held that the First Amendment's free speech guarantees and the Sixth Amendment's guarantee of public trials require a court to articulate an overriding interest in closing a public trial and that the closure order be narrowly tailored so as to accommodate only the overriding interest in restricting public attendance. In this case, however, the judicial proceedings are open to the public. Only one particular form of media coverage is excluded. General public access to the proceedings, including access by television reporters without cameras, is permitted. Under these circumstances, the restrictions on a particular form of coverage do not per se implicate any constitutionally protected right of the press to gather and report news. See, e.g., Conway v. United States, 852 F.2d 187 (6th Cir.), cert. denied, 488 U.S. 943 (1988); United States v. Hastings, 695 F.2d 1278 (11th Cir.), cert. denied, 461 U.S. 931 (1983); Westmoreland v. Columbia Broadcasting Sys., Inc. 752 F.2d 16 (2d Cir. 1984), cert. denied, 1017 U.S. 472 (1985); United States v. Torres, 602 F.Supp. 1458 (N.D. Ill. 1985), cert. denied, 470 U.S. 1087 (1985). We therefore decline to engraft onto Rule 30 the notion that limitations on particular forms of press coverage of public trials carry with them the same constitutional concerns as complete closure of judicial proceedings.

While this is a case of first impression in Tennessee, the courts of Ohio and Florida have addressed issues similar to those presented in this appeal. Ohio's C.P. Sup. R. 11 provides in pertinent part that "[t]he judge presiding at the trial or hearing shall permit the broadcasting or recording by electronic means and the taking of photographs in court proceedings open to the public as provided in Canon 3A(7) of the Code of Judicial Conduct". Canon 3A(7) of the Ohio Code of Judicial Conduct provides as follows:

(7) A trial judge or appellate court should permit [media coverage, including television coverage] under the following conditions:

(i) permission should be expressly granted in advance in writing by the trial judge or appellate court pursuant to such conditions as the judge or appellate court and superintendence rules of Supreme Court may prescribe;

(ii) the trial judge or appellate court determines, upon consideration of a request for permission for the broadcasting, television, recording, or taking of photographs in the courtroom in a particular case, that the broadcasting, televising, recording, and taking of photographs would not distract participants or impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair trial or hearing therein.

The Ohio Supreme Court has held that C.P. Sup. R. 11 and Canon 3A(7) create a presumption that in-court news coverage, including television coverage, is to be allowed and that a court must scrutinize the case before it is to determine if any of the disqualifying factors to in-court coverage found in Canon 3A(7)(c)(ii) or (iii) are present in the case. State ex rel. Grinnell Communications Corp. v. Love, 406 N.E.2d. 809, 810 (Ohio 1980). The determination that a factor disqualifying in-court television coverage is present in a given case must be supported by record evidence in order to sustain the judge's decision to exclude any particular form of media coverage from the courtroom. State ex rel. Miami Valley Broadcasting Corp. v. Kessler, 413 N.E.2d 1203, 1205 (Ohio 1980); State ex rel. Cosmos Broadcasting v. Brown, 471 N.E.2d 874, 882 (Ohio App. 1984). A judge's personal experience with in-court media coverage, extensive publicity surrounding the case, or a conclusory finding that in-court media coverage might interfere with a defendant's right to a fair trial are not sufficient reasons to support a decision to exclude media coverage from the courtroom. Brown, 471 N.E.2d at 878-81.

The Florida rule regarding courtroom coverage by the electronic media states the following:

Subject at all times to the authority of the presiding judge to (i) control and conduct the proceedings before the court; (ii) ensure decorum and prevent distractions; and

(iii) ensure the fair administration of justice in the pending case, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

Fla. Code of Judicial Conduct, Canon 3A(7).

The Florida Supreme Court has held that it is an abuse of the trial court's discretion to exclude the media from the courtroom without record evidence to support the finding. State v. Palm Beach Newspapers, Inc., 395 So.2d 544, 549 (Fla. 1981). In addition, the evidence must support a finding that in-court media coverage will have a qualitatively different effect on the particular case before the court as opposed to the effects of in-court media coverage in general. Id.; State v. Green, 395 So.2d 532, 538 (Fla. 1981).

The preferable method for determining whether to exclude the media from a particular judicial proceeding is an evidentiary hearing where the party opposing media coverage bears the burden of showing that in-court media coverage should be disallowed. Green, 395 So.2d at 538. However, where an evidentiary hearing would disrupt the timing, procedures, or sequence of the main trial, the evidentiary basis for excluding media coverage, or a particular form of it, may be supplied by affidavits or judicial notice. Palm Beach Newspapers, 395 So.2d at 548-49. In any event, general effects resulting from public notoriety of a case are insufficient to warrant exclusion of the media, including the electronic media, from the courtroom. Green, 395 So.2d at 538.

No Tennessee cases deal with the exclusion of media coverage, or a particular form of it, from an otherwise public trial. Tennessee law does, however, recognize that discretionary judicial acts requiring specific findings must be supported by record evidence showing a conscientious exercise of discretion. See, e.g., State v. Harkins, 811 S.W.2d 79 (Tenn. 1991) (discretionary probation revocation must be supported by substantial evidence that a violation of probation

conditions has occurred); Duncan v. Duncan, 789 S.W.2d 557 (Tenn. Ct. App. 1990) (trial court's order limiting discovery, although discretionary, is not insulated from review--party seeking discovery limitations must produce specific facts to establish that limitations are warranted).

In light of the foregoing, we are persuaded, as noted earlier, that Tennessee Supreme Court Rule 30 creates a presumption in favor of in-court media coverage, including the presence of television cameras, in accordance with the procedures set forth in the rule. The trial judge has the discretion to deny, limit, suspend, or terminate the in-court media coverage if necessary to accommodate one or more of the four interests set out in Rules 30A (1) and 30D (2). However, given the presumption in favor of media coverage of judicial proceedings, any finding that such coverage should be denied, limited, suspended, or terminated must be supported by substantial evidence that at least one of the four interests in Rules 30A (1) and 30D (2) is of concern in the case before the court and that the order excluding or limiting, etc., is necessary to adequately reach an accommodation of the interest involved.

This evidence should be produced at an evidentiary hearing if such a hearing will not disrupt or delay the principal proceedings before the court. In the event that an evidentiary hearing is not possible, affidavits may be used. The burden of proof in producing this evidence is on the party seeking limits on media coverage. Of course, even if there is no opposition to media coverage, the presiding judge may take into account matters that are properly the subject of judicial notice.

In the present case, the record before this court reflects only general statements of counsel and the trial judge about the presence of television cameras in the courtroom. There is no evidence to substantiate the fears expressed concerning the safety of witnesses in the case, nor is there any proof that television cameras would result in unacceptable distractions. It therefore appears that the trial

court abused its discretion in excluding television cameras from the criminal trial in this matter.

In view of our holding in this case it is unnecessary to address the constitutional issues raised by the intervenors. See, e.g., Glasgow v. Fox, 383 S.W.2d 9 (Tenn. 1964); Beck v. Puckett, 2 Tenn. Cases 490 (1877) (courts should avoid passing on constitutional issues unless the determination of such issues is absolutely necessary to decide the case).

The decision of the trial court in this case regarding television cameras in the courtroom is reversed, and it is ordered that, unless there is an additional hearing on this issue, future proceedings in this matter shall be open to television coverage in accordance with the plan previously submitted by the intervenors/appellants.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE